

AMENDED IN SENATE APRIL 24, 2007

AMENDED IN SENATE MARCH 19, 2007

SENATE BILL

No. 233

Introduced by Senator Cox

(Principal coauthor: Assembly Member Niello)

February 14, 2007

An act to amend Section 20133 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 233, as amended, Cox. Public contracts: design-build contracting.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law, until January 1, 2011, authorizes certain counties, with the approval of the board of supervisors, to enter into specified design-build contracts for construction projects, in accordance with specified provisions. Existing law defines a "project" as the construction of a building and the improvements directly related to the construction of a building. Existing law ~~excludes from the definition of project the construction of specified infrastructure~~ *includes findings and declarations for this provision stating the intent of the Legislature with regard to enabling the specified counties to use cost-effective options for modernizing public facilities.*

This bill would change the definition of project to mean the construction of ~~public improvements, except for streets, roads, and bridges~~ *building and improvements directly related to the construction of a building, and county wastewater treatment facilities. This bill would also change the findings and declarations for this provision to state the*

intent of the Legislature to enable the specified counties to use the design-build method for buildings and county sanitation wastewater treatment infrastructure. This bill would also remove a portion of the legislative findings and declarations.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 20133 of the Public Contract Code is
2 amended to read:

3 20133. (a) (1) This section provides for an alternative
4 procedure on bidding on construction projects in excess of two
5 million five hundred thousand dollars (\$2,500,000) applicable only
6 in the Counties of Alameda, Butte, Contra Costa, Del Norte, El
7 Dorado, Fresno, Humboldt, Kings, Los Angeles, Madera, Mariposa,
8 Mendocino, Merced, Monterey, Napa, Orange, Placer, Sacramento,
9 San Diego, San Joaquin, San Luis Obispo, Santa Clara, Shasta,
10 Siskiyou, Solano, Sonoma, Stanislaus, Tulare, Yolo, and Yuba,
11 upon approval of the appropriate board of supervisors.

12 (2) These counties may award the project using either the lowest
13 responsible bidder or by best value.

14 ~~(b) (1) It is the intent of the Legislature to enable these counties~~
15 ~~to utilize cost-effective options for building and modernizing public~~
16 ~~facilities. It is not the intent of the Legislature to authorize this~~
17 ~~procedure for transportation facilities, including, but not limited~~
18 ~~to, streets, roads, and bridges.~~

19 ~~(2) The Legislature also finds and declares that utilizing a~~
20 ~~design-build contract requires a clear understanding of the roles~~
21 ~~and responsibilities of each participant in the design-build process.~~
22 ~~The Legislature also finds that the cost-effective benefits to the~~
23 ~~counties are achieved by shifting the liability and risk for cost~~
24 ~~containment and project completion to the design-build entity.~~

25 ~~(3) It is the intent of the Legislature to provide an alternative~~
26 ~~and optional procedure for bidding and building construction~~
27 ~~projects for these counties.~~

28 ~~(4) The design-build approach may be used, but is not limited~~
29 ~~to, when it is anticipated that it will: reduce project cost, expedite~~
30 ~~project completion, or provide design features not achievable~~
31 ~~through the design-bid-build method.~~

1 ***(b) (1) It is the intent of the Legislature to enable these counties***
2 ***to utilize design-build for buildings and county sanitation***
3 ***wastewater treatment facilities. It is not the intent of the Legislature***
4 ***to authorize this procedure for other infrastructure, including, but***
5 ***not limited to, streets and highways, public rail transit, or water***
6 ***resources facilities and infrastructures.***

7 ***(2) The Legislature also finds and declares that utilizing a***
8 ***design-build contract requires a clear understanding of the roles***
9 ***and responsibilities of each participant in the design-build process.***

10 ~~***(5)***~~
11 ***(3) If the board of supervisors elects to proceed under this***
12 ***section, the board of supervisors shall establish and enforce for***
13 ***design-build projects a labor compliance program containing the***
14 ***requirements outlined in Section 1771.5 of the Labor Code, or it***
15 ***shall contract with a third party to operate a labor compliance***
16 ***program containing the requirements outlined in Section 1771.5***
17 ***of the Labor Code. This requirement shall not apply to any project***
18 ***where the county or the design-build entity has entered into any***
19 ***collective bargaining agreement or agreements that bind all of the***
20 ***contractors performing work on the projects.***

21 ***(c) As used in this section:***

22 ***(1) “Best value” means a value determined by objective criteria***
23 ***related to price, features, functions, and life-cycle costs.***

24 ***(2) “Design-build” means a procurement process in which both***
25 ***the design and construction of a project are procured from a single***
26 ***entity.***

27 ***(3) “Design-build entity” means a partnership, corporation, or***
28 ***other legal entity that is able to provide appropriately licensed***
29 ***contracting, architectural, and engineering services as needed***
30 ***pursuant to a design-build contract.***

31 ~~***(4) “Project” means the construction of public improvements,***~~
32 ~~***except for streets, roads, and bridges.***~~

33 ***(4) “Project” means the construction of a building and***
34 ***improvements directly related to the construction of a building,***
35 ***and county sanitation wastewater treatment facilities, but does***
36 ***not include the construction of other infrastructure, including, but***
37 ***not limited to, streets and highways, public rail transit, or water***
38 ***resources facilities and infrastructure.***

39 ***(d) Design-build projects shall progress in a four-step process,***
40 ***as follows:***

(1) (A) The county shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the public improvement, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the county's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(B) Any architect or engineer retained by the county to assist in the development of the project specific documents shall not be eligible to participate in the preparation of a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared in paragraph (1), the county shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the county. The request for proposals shall include, but is not limited to, the following elements:

(i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the county to inform interested parties of the contracting opportunity, to include the methodology that will be used by the county to evaluate proposals and specifically if the contract will be awarded to the lowest responsible bidder.

(ii) Significant factors that the county reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors.

(iii) The relative importance of weight assigned to each of the factors identified in the request for proposals.

(B) With respect to clause (iii) of subparagraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors other than cost or price when combined are:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(C) If the county chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposal and shall publish separately or incorporate

1 into the request for proposal applicable rules and procedures to be
2 observed by the county to ensure that any discussions or
3 negotiations are conducted in good faith.

4 (3) (A) The county shall establish a procedure to prequalify
5 design-build entities using a standard questionnaire developed by
6 the county. In preparing the questionnaire, the county shall consult
7 with the construction industry, including representatives of the
8 building trades and surety industry. This questionnaire shall require
9 information including, but not limited to, all of the following:

10 (i) If the design-build entity is a partnership, limited partnership,
11 or other association, a listing of all of the partners, general partners,
12 or association members known at the time of bid submission who
13 will participate in the design-build contract, including, but not
14 limited to, mechanical subcontractors.

15 (ii) Evidence that the members of the design-build entity have
16 completed, or demonstrated the experience, competency, capability,
17 and capacity to complete, projects of similar size, scope, or
18 complexity, and that proposed key personnel have sufficient
19 experience and training to competently manage and complete the
20 design and construction of the project, as well as a financial
21 statement that assures the county that the design-build entity has
22 the capacity to complete the project.

23 (iii) The licenses, registration, and credentials required to design
24 and construct the project, including information on the revocation
25 or suspension of any license, credential, or registration.

26 (iv) Evidence that establishes that the design-build entity has
27 the capacity to obtain all required payment and performance
28 bonding, liability insurance, and errors and omissions insurance.

29 (v) Any prior serious or willful violation of the California
30 Occupational Safety and Health Act of 1973, contained in Part 1
31 (commencing with Section 6300) of Division 5 of the Labor Code,
32 or the federal Occupational Safety and Health Act of 1970 (P.L.
33 91-596), settled against any member of the design-build entity,
34 and information concerning workers' compensation experience
35 history and worker safety program.

36 (vi) Information concerning any debarment, disqualification,
37 or removal from a federal, state, or local government public works
38 project. Any instance in which an entity, its owners, officers, or
39 managing employees submitted a bid on a public works project

1 and were found to be nonresponsive, or were found by an awarding
2 body not to be a responsible bidder.

3 (vii) Any instance in which the entity, or its owners, officers,
4 or managing employees, defaulted on a construction contract.

5 (viii) Any violations of the Contractors' State License Law
6 (Chapter 9 (commencing with Section 7000) of Division 3 of the
7 Business and Professions Code), excluding alleged violations of
8 federal or state law including the payment of wages, benefits,
9 apprenticeship requirements, or personal income tax withholding,
10 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.
11 3101 et seq.) withholding requirements settled against any member
12 of the design-build entity.

13 (ix) Information concerning the bankruptcy or receivership of
14 any member of the design-build entity, including information
15 concerning any work completed by a surety.

16 (x) Information concerning all settled adverse claims, disputes,
17 or lawsuits between the owner of a public works project and any
18 member of the design-build entity during the five years preceding
19 submission of a bid pursuant to this section, in which the claim,
20 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
21 Information shall also be provided concerning any work completed
22 by a surety during this period.

23 (xi) In the case of a partnership or other association, that is not
24 a legal entity, a copy of the agreement creating the partnership or
25 association and specifying that all partners or association members
26 agree to be fully liable for the performance under the design-build
27 contract.

28 (B) The information required pursuant to this subdivision shall
29 be verified under oath by the entity and its members in the manner
30 in which civil pleadings in civil actions are verified. Information
31 that is not a public record pursuant to the California Public Records
32 Act (Chapter 3.5 (commencing with Section 6250) of Division 7
33 of Title 1 of the Government Code) shall not be open to public
34 inspection.

35 (4) The county shall establish a procedure for final selection of
36 the design-build entity. Selection shall be based on either of the
37 following criteria:

38 (A) A competitive bidding process resulting in lump-sum bids
39 by the prequalified design-build entities. Awards shall be made to
40 the lowest responsible bidder.

1 (B) A county may use a design-build competition based upon
2 best value and other criteria set forth in paragraph (2). The
3 design-build competition shall include the following elements:

4 (i) Competitive proposals shall be evaluated by using only the
5 criteria and selection procedures specifically identified in the
6 request for proposal. However, the following minimum factors
7 shall each represent at least 10 percent of the total weight of
8 consideration given to all criteria factors: price, technical design,
9 and construction expertise, life cycle costs over 15 years or more,
10 skilled labor force availability, and acceptable safety record.

11 (ii) Once the evaluation is complete, the top three responsive
12 bidders shall be ranked sequentially from the most advantageous
13 to the least.

14 (iii) The award of the contract shall be made to the responsible
15 bidder whose proposal is determined, in writing, to be the most
16 advantageous.

17 (iv) Notwithstanding any provision of this code, upon issuance
18 of a contract award, the county shall publicly announce its award,
19 identifying the contractor to whom the award is made, along with
20 a written decision supporting its contract award and stating the
21 basis of the award. The notice of award shall also include the
22 county's second and third ranked design-build entities.

23 (v) For the purposes of this paragraph, "skilled labor force
24 availability" shall be determined by the existence of an agreement
25 with a registered apprenticeship program, approved by the
26 California Apprenticeship Council, which has graduated
27 apprentices in each of the preceding five years. This graduation
28 requirement shall not apply to programs providing apprenticeship
29 training for any craft that has been deemed by the Department of
30 Labor and the Department of Industrial Relations to be an
31 apprenticeable craft in the five years prior to enactment of this act.

32 (vi) For the purposes of this paragraph, a bidder's "safety
33 record" shall be deemed "acceptable" if their experience
34 modification rate for the most recent three-year period is an average
35 of 1.00 or less, and their average Total Recordable Injury/Illness
36 rate and average lost work rate for the most recent three-year period
37 does not exceed the applicable statistical standards for its business
38 category or if the bidder is a party to an alternative dispute
39 resolution system as provided for in Section 3201.5 of the Labor
40 Code.

(e) (1) Any design-build entity that is selected to design and build a project pursuant to this section shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the county.

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the county in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

(1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the county.

(2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(g) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (d) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the county.

(h) The county may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(i) Contracts awarded pursuant to this section shall be valid until the project is completed.

(j) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(k) (1) If the county elects to award a project pursuant to this section, retention proceeds withheld by the county from the

1 design-build entity shall not exceed 5 percent if a performance and
2 payment bond, issued by an admitted surety insurer, is required in
3 the solicitation of bids.

4 (2) In a contract between the design-build entity and the
5 subcontractor, and in a contract between a subcontractor and any
6 subcontractor thereunder, the percentage of the retention proceeds
7 withheld may not exceed the percentage specified in the contract
8 between the county and the design-build entity. If the design-build
9 entity provides written notice to any subcontractor who is not a
10 member of the design-build entity, prior to or at the time the bid
11 is requested, that a bond may be required and the subcontractor
12 subsequently is unable or refuses to furnish a bond to the
13 design-build entity, then the design-build entity may withhold
14 retention proceeds in excess of the percentage specified in the
15 contract between the county and the design-build entity from any
16 payment made by the design-build entity to the subcontractor.

17 (I) Each county that elects to proceed under this section and
18 uses the design-build method on a public works project shall submit
19 to the Legislative Analyst's Office before December 1, 2009, a
20 report containing a description of each public works project
21 procured through the design-build process and completed after
22 November 1, 2004, and before November 1, 2009. The report shall
23 include, but shall not be limited to, all of the following information:

- 24 (1) The type of project.
- 25 (2) The gross square footage of the project.
- 26 (3) The design-build entity that was awarded the project.
- 27 (4) The estimated and actual length of time to complete the
28 project.
- 29 (5) The estimated and actual project costs.
- 30 (6) A description of any written protests concerning any aspect
31 of the solicitation, bid, proposal, or award of the design-build
32 project, including the resolution of the protests.
- 33 (7) An assessment of the prequalification process and criteria.
- 34 (8) An assessment of the effect of retaining 5-percent retention
35 on the project.
- 36 (9) A description of the Labor Force Compliance Program and
37 an assessment of the project impact, where required.
- 38 (10) A description of the method used to award the contract. If
39 best value was the method, the report shall describe the factors

1 used to evaluate the bid, including the weighting of each factor
2 and an assessment of the effectiveness of the methodology.

3 (11) An assessment of the project impact of “skilled labor force
4 availability.”

5 (12) An assessment of the design-build dollar limits on county
6 projects. This assessment shall include projects where the county
7 wanted to use design-build and was precluded by the dollar
8 limitation. This assessment shall also include projects where the
9 best value method was not used due to dollar limitations.

10 (13) An assessment of the most appropriate uses for the
11 design-build approach.

12 (m) Any county named in subdivision (a) that elects to not use
13 the authority granted by this section may submit a report to the
14 Legislative Analyst’s Office explaining why the county elected to
15 not use the design-build method.

16 (n) On or before January 1, 2010, the Legislative Analyst shall
17 report to the Legislature on the use of the design-build method by
18 counties pursuant to this section, including the information listed
19 in subdivision (l). The report may include recommendations for
20 modifying or extending this section.

21 (o) This section shall remain in effect only until January 1, 2011,
22 and as of that date is repealed, unless a later enacted statute, that
23 is enacted before January 1, 2011, deletes or extends that date.